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IN THE

Supreme Court of the United States

October Term, 1975

No. 75-126

BERTRAM L. PODELL,

Petitioner,

against

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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Dated: July 24, 1975

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The Petitioner, Bertram L. Podell, prays that a Writ of Certiorari issue to review the judgment and opinion entered on June 24th, 1975, by the United States Court of Appeals for the Second Circuit in a proceeding entitled *United States of America, Plaintiff-Appellee, against Bertram L. Podell and Martin Miller, Defendants-Appellants,* Docket No. 75-1019.

Opinion Below

The judgment and opinion of the Court of Appeals for the Second Circuit, not yet reported, appears in the Appendix at page 1a.

Jurisdiction

The judgment and opinion of the Court of Appeals was entered on June 24th, 1975. The jurisdiction of this Court is invoked under Title 28, United States Code, Section 1254(1).

Question Presented

Whether the Circuit Court of Appeals erred in not applying the *Santobello* rule where the Government was found to have breached a promise concerning sentence recommendation?

Statutory Provision Involved

Rule 32(d) of the Federal Rules of Criminal Procedure states as follows:

> "(d) Withdrawal of Plea of Guilty. A Motion to withdraw a plea of guilty or of *nolo contendere* may be made only before sentence is imposed or imposition of sentence is suspended; but to correct manifest injustice the court after sentence may set aside the judgment of conviction and permit the defendant to withdraw his plea."

Statement of the Case

On his plea of guilty, Petitioner, Bertram L. Podell, was convicted in the United States District Court for the Southern District of New York of violating the Federal Conflict of Interest statute, Title 18, United States Code, Section 203 and conspiracy to violate that statute in violation of Title 18, United States Code, Section 371. The In-

dictment in this case arose out of Podell's appearance before various Federal agencies on behalf of Florida-Atlantic Airlines, a now defunct corporation, while a member of the House of Representatives. The theory of the Government's case was that Podell was compensated for these appearances by fees paid to Petitioner's law firm and campaign contributions.

Prior to sentence, Petitioner moved in the District Court pursuant to Rule 32(d) of the Federal Rules of Criminal Procedure for an order allowing him to withdraw his plea of guilty. This motion was grounded upon an allegation that certain essential promises made by the Government during plea negotiations had been breached when, on the eve of sentence, a Government attorney recommended that Podell be sentenced to jail.[1]

On the motion, Petitioner alleged that this letter flew in the face of a categorical promise by the Government attorneys that they would:

> ". . . not recommend imprisonment, and further would take absolutely no position at the time of sentence." (A 60)[2]

In response to Petitioner's claim in the District Court, the Government asserted that the letter in question was not a recommendation that Podell be sentenced to jail. (A 78-79) The Trial Court dismissed this argument out-of-hand and stated that:

> "I think the letter is a recommendation for a jail sentence and I think if you did make such a

[1] This letter appears in the Circuit Court's opinion on page 4369-70.

[2] The letter "A" refers to Petitioner's Appendix on file in the United States Court of Appeals for the Second Circuit.

> promise, the question is whether or not only that you violated it, but what effect that had." (A 79)

Furthermore, the Court's attention was drawn to an agreement that one of the Government attorneys would testify on Podell's behalf at any disciplinary proceeding conducted by the Bar Association.[3] The purpose of this testimony:

> ". . . would be to demonstrate to the referee that there was no bribery involved in this case and, further, that the offenses of which the defendant was convicted did not reflect a corrupt and criminal intent." (A 60)

It was clear that this letter pragmatically precluded Podell from calling one of the Government attorneys to testify at such a proceeding. (A 61)

After testimony taken at an evidentiary hearing, the Court made a finding of fact that the Government had indeed made a representation to Podell and that the letter was "in essence . . . a violation of the spirit, if not the letter of the agreement." (A 180) The District Court concluded, however, that the Government's representation did not "play a material or significant part in the defendant's plea." (A 180-181)

In agreeing with the District Court, the Circuit Court ruled as follows:

> "It is uncontroverted that Podell's main purpose in pleading guilty was to avoid a conviction of bribery and automatic disbarment. The district judge found that his plea rested 'principally and primarily and exclusively' on that basis. Considering that Podell specifically denied [at the time of

[3] Podel was admitted to the New York Bar in 1950.

> the plea] that he was pleading in response to pressure or promises, we hold that the court's finding was not clearly erroneous. Podell's guilty plea must therefore stand since it rested in no significant degree on the government's promises."

Reasons for Granting the Writ

Petitioner herein contends that the conclusion reached by both the District Court and the Circuit Court of Appeals is unsupported in the record and results from a serious misreading of this Court's decision in *Santobello* v. *New York*, 404 U.S. 257 (1971).

This Court in the *Santobello* case ruled that:

> "When a plea rests in any significant degree on a promise or agreement of the prosecutor, so that it can be said to be part of the inducement or consideration, such promise must be fulfilled."

In the case at bar, the District Judge made a finding of fact that the promise to abstain from a recommendation on sentence was made and then that agreement was breached.[4]

The Trial Court ruled that:

> "I think I have announced already my position on the letter, the government's letter of January 2, court's exhibit 1, is a recommendation that prison be imposed. Otherwise, the letter makes no sense at all to me.
>
> The government does not recommend a specific prison term and argues this letter does not violate a representation. While that may be technically correct, I view the letter in essence as a violation of the spirit, if not the letter of the agreement." (A 180)

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[4] The letter in question cannot be characterized as a negligent or inadvertent breach of the promise. After denial of Petitioner's motion and prior to the imposition of sentence, another Government attorney brazenly excoriated Podell and further advanced the theme previously set forth in the letter. (A 191-199)

In denying Petitioner's motion, however, the Court concluded that the representations or promises made by the prosecutor were not a material or significant part of the plea.

As stated by the Court of Appeals, it is uncontroverted that Petitioner's "main purpose" in pleading guilty was to avoid a felony conviction and thus automatic disbarment. In *Santobello* itself, however, Petitioner's "main purpose" in pleading guilty was "to secure dismissal of more serious charges. . . ." It is clear, therefore, that the *Santobello* ruling is not limited by a requirement that the alleged breach concern "the main purpose" of the plea. Indeed, the issue, as articulated in *Santobello,* is whether the promise or agreement "can be said to be part of the inducement or consideration. . . ." The question arising out of this case, therefore, is whether the promise or agreement was part of the inducement or consideration. Petitioner asserts that contrary to the rulings below, the record clearly suggests an affirmative answer.

It is first submitted that the very nature of these promises or agreements clearly illustrates their importance in the plea-bargaining process. It is difficult to imagine that in any criminal case, a defendant could be totally indifferent to the question of whether he would be incarcerated. It should be sufficient to point out that Podell and his attorneys actively solicited the Government's representation that they would not recommend imprisonment. To then argue that this promise was not part of Podell's consideration of his plea is disingenuous.

With regard to the Government's promise concerning the prospective testimony of a Government attorney at a disciplinary proceeding, it is utterly impossible to minimize the relative significance of this agreement. At the very least, Assistant United States Attorney Guiliani was pre-

pared to testify, according to his own testimony at the evidentiary hearing (A 104-105), that there was no bribery involved in this conviction. To be sure, the value of such testimony by one's adversary in a criminal proceeding is inestimable. The letter, however, which is totally antagonistic to a finding that Podell should pass muster in any examination of his character, pragmatically foreclosed Petitioner's ability to call Guiliani as a witness.

Yet another fact which would preclude a finding that Podell did not rely on this agreement is Guiliani's own testimony at the evidentiary hearing that he was asked by Podell's counsel to personally speak to Podell and make this assurance. Mr. Guiliani testified that:

> "You [petitioner's attorney] asked me if I would come into the witness room with you, the first witness room Mr. Podell was in, and tell that to Mr. Podell. And I said I didn't want to do that. And you said, it would be helpful if I did so. I went in the witness room, the first witness room we were in —that's the first time I talked to Mr. Podell that afternoon—and you said tell him what you said. And I said, 'If called to testify at the Bar Association, we would testify.' Mr. Jaffe was with me." (A 104)

Additionally, two attorneys representing Mr. Podell testified without reservation that Podell relied upon these promises. (A 124, 152)

It is clear, therefore, that the Circuit Court's ruling is wholly inconsistent with this Court's ruling in *Santobello* v. *New York, supra.* For this reason, it would seem that review is appropriate.

CONCLUSION

For the foregoing reasons, a Writ of Certiorari should issue to review the judgment and opinion of the Second Circuit Court of Appeals.

Dated: July 24th, 1975

Respectfully submitted,

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